

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Comcast Cable Communications, LLC, on behalf of its subsidiaries and affiliates)	CSR 8008-E
)	
Petition for Determination of Effective Competition in Six Blaine, Minnesota Franchise Areas)	
)	
Application for Review)	

MEMORANDUM OPINION AND ORDER

Adopted: April 18, 2018

Released: April 18, 2018

By the Commission: Commissioner Clyburn concurring.

I. INTRODUCTION

1. North Metro Telecommunications Commission (North Metro), a franchising authority whose jurisdiction includes the six Minnesota franchise areas at issue in this proceeding (the Communities),¹ has filed an Application for Review (AFR)² of the Media Bureau (Bureau) *Order* in the above-captioned proceeding.³ The *Order* granted a petition for determination of effective competition filed by Comcast Cable Communications, LLC (Comcast), and revoked North Metro’s previous certification to regulate basic cable service rates in the Communities. For the reasons set forth below, we deny North Metro’s AFR.

II. BACKGROUND

2. A franchising authority may regulate basic cable service tier rates and equipment only if the Commission finds that the cable system is not subject to effective competition.⁴ Under the Communications Act of 1934, as amended (the Act), a cable operator will be deemed subject to effective competition if it is shown that one of four statutory tests is satisfied.⁵ The type of effective competition relevant to this proceeding is known as “competing provider effective competition.”⁶ Section 623(l)(1)(B) of the Act provides that the test for competing provider effective competition is satisfied if the franchise area is “(i) served by at least two unaffiliated multichannel video programming distributors [(MVPDs)] each of which offers comparable video programming to at least 50 percent of the households

¹ The Communities and their associated Community Unit Identification (CUID) numbers are Blaine (MN 0370), Centerville (MN 0371), Circle Pines (MN 0372), Ham Lake (MN 0374), Lino Lakes (MN 0376), and Spring Lake Park (MN 0377 and MN 0378). Comcast previously withdrew its request for a finding of effective competition in a seventh community, Lexington (MN 0375).

² North Metro Telecommunications Commission, Application for Review (filed May 30, 2013) (AFR). The AFR was filed pursuant to Section 1.115 of the Commission’s rules. 47 CFR § 1.115.

³ *Comcast Cable Comm’cns, LLC, Petition for Determination of Effective Competition in Six Blaine, Minnesota Franchise Areas*, Memorandum Opinion and Order, 28 FCC Rcd 5508 (MB 2013) (*Order*).

⁴ See 47 U.S.C. § 543(a)(2)(A).

⁵ *Id.* § 543(l); see also 47 CFR § 76.905(b).

⁶ 47 U.S.C. § 543(l)(1)(B); see also 47 CFR § 76.905(b)(2).

in the franchise area; and (ii) the number of households subscribing to programming services offered by [MVPDs] other than the largest [MVPD] exceeds 15 percent of the households in the franchise area[.]”⁷

3. North Metro previously was certified by the Commission to regulate basic cable service rates in the Communities.⁸ In August 2008, Comcast filed a petition requesting that the Commission make a finding of competing provider effective competition in the Communities and revoke North Metro’s certification.⁹ In April 2013, the Bureau revoked North Metro’s certification to regulate cable rates in the Communities, finding that the presence of competing provider effective competition precluded such regulation.¹⁰ The *Order* concluded that Comcast’s cable system serving the Communities is subject to effective competition pursuant to Section 623(l)(1)(B) and the Commission’s implementing rules, and is therefore exempt from cable rate regulation by North Metro in the Communities, because of the competing service provided by two direct broadcast satellite (DBS) providers, DIRECTV, Inc. (DIRECTV) and DISH Network (DISH).¹¹ Specifically, the *Order* found that the number of households subscribing to programming services offered by the two DBS providers exceeded 18 percent in each of the six Communities, and that it exceeded 27 percent in four of the six Communities.¹² In response to the *Order*, North Metro filed the AFR. Comcast then filed an opposition,¹³ to which North Metro filed a reply.¹⁴

4. In June 2015, the Commission reversed its decades-old rebuttable presumption that cable operators were not subject to effective competition and adopted a new rebuttable presumption that cable operators are subject to competing provider effective competition.¹⁵ In the absence of a demonstration to the contrary, the Commission now presumes that cable systems are subject to competing provider effective competition.¹⁶ For those effective competition cases that were pending when the Commission adopted its new rebuttable presumption, and for which the franchising authority did not file a revised recertification (Form 328) containing new evidence, the Commission considers only the record before it in deciding the cable operator’s petition.¹⁷ Here, North Metro did not file a revised Form 328.¹⁸

⁷ 47 U.S.C. § 543(l)(1)(B); 47 CFR § 76.905(b)(2).

⁸ See AFR at 6.

⁹ Comcast Cable Communications, LLC, Petition for Special Relief (filed Aug. 18, 2008) (Petition).

¹⁰ *Order*.

¹¹ *Id.* at 5508, para. 1.

¹² *Id.* at 5516, Attach. A (finding that DBS penetration in the Communities ranged from 18.39% to 32.81%).

¹³ Comcast Cable Communications, LLC, Opposition to Application for Review (filed June 10, 2013) (Opposition).

¹⁴ North Metro Telecommunications Commission, Reply to Opposition to Application for Review (filed June 20, 2013) (Reply).

¹⁵ See *Amendment to the Commission’s Rules Concerning Effective Competition; Implementation of Section 111 of the STELA Reauthorization Act*, Report and Order, 30 FCC Rcd 6574 (2015) (*Effective Competition Order*), *aff’d sub nom. Nat’l Ass’n of Telecomms. Officers and Advisors v. FCC*, 862 F.3d 18 (D.C. Cir. 2017). The Commission continues to presume that cable systems are not subject to any of the other three types of effective competition, as defined by Sections 623(l)(1)(A), (C), and (D) of the Act and Sections 76.905(b)(1), (3) and (4) of the Commission’s rules. 47 CFR § 76.906(b). See also *Effective Competition Order*, 30 FCC Rcd at 6587, para. 18.

¹⁶ See 47 U.S.C. § 543(l)(1); 47 CFR §§ 76.905(b), 76.906. Pursuant to the *Effective Competition Order*, any franchising authority that was certified to regulate the basic service tier rates and equipment that wished to remain certified after the new presumption went into effect was required to file a revised certification (Form 328) within 90 days of the effective date of the new rules. *Effective Competition Order*, 30 FCC Rcd at 6592, para 27.

¹⁷ *Effective Competition Order*, 30 FCC Rcd at 6594, para. 30. Where a pending application for review involves a franchising authority that filed a revised Form 328 during the 90-day time frame, the Commission will consider the existing record along with the new certification. *Id.* at 6593, para. 28.

Accordingly, we consider the record before us, which is based on filings that the parties submitted to the Commission between 2008 and 2013, to resolve the AFR.

III. DISCUSSION

5. Upon consideration of the AFR and the record before us, we affirm the conclusion in the *Order* that Comcast is subject to effective competition because it has satisfied both elements of the competing provider test for effective competition in the Communities.

6. North Metro does not dispute that Comcast satisfied the first part of the competing provider test, which is whether the franchise area is served by at least two unaffiliated MVPDs, each of which offers comparable video programming to at least 50 percent of the households in the franchise area.¹⁹ Instead, on review, North Metro argues that there are several reasons the Commission should overturn the Bureau's finding that Comcast has satisfied the second part of the competing provider effective competition test, which is whether more than 15 percent of the households in the franchise area subscribe to competing providers.

7. *DBS Subscriber Data and Number of Households.* First, North Metro argues that "the Bureau fundamentally erred . . . by relying on unverified zip+4 DBS subscriber numbers from Comcast" after North Metro provided "*prima facie* evidence showing actual and potential errors in those numbers."²⁰ North Metro also repeats its claim that the Bureau should have used Metropolitan Council household numbers²¹ rather than household numbers from the 2000 Census, and that the Bureau should not have used 2000 Census data along with more recent 2008 DBS subscriber numbers.²²

8. We affirm the Bureau's acceptance of DBS numbers based on nine-digit zip codes as providing sufficiently precise subscriber data.²³ We reject North Metro's claim that the Bureau erroneously used a "best guess" standard and should have independently reviewed the DBS

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¹⁸ See *Findings of Competing Provider Effective Competition Following December 8, 2015 Filing Deadline for Existing Franchise Authority Recertification*, Public Notice, 30 FCC Rcd 14293 at App. E (MB 2015).

¹⁹ AFR at 7-12. See also *Order*, 28 FCC Rcd at 5510, para 7 (finding the first part of the competing provider test satisfied).

²⁰ AFR at 8.

²¹ According to North Metro, the Metropolitan Council "is the planning agency for the region in which the Communities lie." See *Order*, 28 FCC Rcd at 5513, para. 15. We agree with the Bureau's explanation that Section 623(l)(B)(ii) of the Act "requires that we measure 'households,' a term for which the Census Bureau has adopted a detailed definition," and that Congress intended to apply the Census Bureau's definition of "household" to the test for competing provider effective competition. *Id.* at 5513, para. 16 (citing *Implementation of Sections of the Cable Television Consumer Protection & Competition Act of 1992: Rate Regulation: Buy-Through Prohibition*, Third Order on Reconsideration, 9 FCC Rcd 4316, 4324, para. 17 (1994) ("As used in the Cable Act, we presume that Congress did not intend 'households' to have a different meaning than in the 1990 Census"), *reversed in part on other grounds, Time Warner Entertainment Co., L.P. v. FCC*, 56 F.3d 151 (D.C. Cir. 1995), *cert. denied*, 516 U.S. 1112 (1996). There is no evidence that the Metropolitan Council uses that definition.

²² AFR at 17. We note that North Metro opposed the Bureau's consideration of a supplement that Comcast submitted in 2012, and the Bureau did not consider the supplement. See *infra* n. 36. The supplement contained 2010 Census household data and more recent DBS subscriber totals, and it used those figures to conclude that the 15 percent threshold was still met in each of the six communities at issue. See *Opposition* at 13.

²³ *Order*, 28 FCC Rcd at 5512, paras. 12-13 ("Nine-digit zip codes are very small and the ones on the edge of a franchise area closely match its boundaries. . . . Nine-digit zip codes are so small that a typical one has no DBS subscribers or only one or two (compared to 2,000 to 4,000 DBS subscribers in the five-digit zip codes involved in this case). The areas in a nine-digit zip code that fall outside a Community are statistically insignificant.") (internal footnote omitted). See also *id.* at 5514, para. 19 (noting that some of North Metro's criticisms of Comcast's data mean that the data "would understate DBS subscribership, thus hurting Comcast's case. No unfairness to North Metro or any franchise authority results from such errors").

subscribership figures, and the underlying nine-digit zip code determinations, or required Comcast to provide further support for its calculations.²⁴ To the contrary, Comcast provided North Metro and the Bureau with a list of every nine-digit zip code that Comcast relied upon, as well as the DBS subscriber count for each such zip code, and we find that the Bureau reasonably determined that the nine-digit zip code data was sufficiently more detailed, precise, and reliable than the five digit zip code data in this case.²⁵ In addition, while North Metro claims that it was speculative for the Bureau to conclude that any errors resulting from the use of Comcast's nine-digit zip code data would be "statistically insignificant,"²⁶ it has submitted no evidence that causes us to reconsider the Bureau's conclusion about the unlikelihood that "areas in a nine-digit zip code that fall outside a Community would alter the applicable percentages below the statutory requirement of 15 percent or more."²⁷ The Bureau based its determination on the DBS subscribership percentages shown in Attachment A to the *Order*, all of which are at least three percentage points higher than the required minimum of 15 percent and four of which are at least twelve percentage points higher.²⁸ Thus, even if Comcast's data included some small number of DBS subscribers that reside outside of the Communities, we agree with the Bureau that this would be unlikely to change the outcome of the *Order*, and North Metro failed to offer reliable evidence to the contrary.

9. Further, we agree with the Bureau, for the reasons set forth in its *Order*, that North Metro did not demonstrate that the Metropolitan Council household numbers were as reliable as household numbers from the Census.²⁹ We also find that it is a reasonable practice for the Bureau to use the U.S. Census data that was most recent at the time an effective competition petition was filed, given that Census household data is most consistent with Congress's intent, even if the applicable subscribership figures are from a different year than the data.³⁰

10. North Metro asserts that, because Comcast provided imprecise data concerning two of the Communities, Lexington and Circle Pines, the Commission should presume that inaccuracies pervade all of Comcast's provided data.³¹ We disagree. Regarding the community of Lexington, Comcast had

²⁴ AFR at 8.

²⁵ See *supra* n.23. See also Opposition at 3-4; *Commission Clarifies Standards for Evidence of Competing Provider Effective Competition for Cable Service*, Public Notice, 24 FCC Rcd 8198 (MB 2009).

²⁶ AFR at 10; *Order*, 28 FCC Rcd at 5512, para. 13.

²⁷ See *supra* n.23. See also AFR at 13 (acknowledging that it "might be true" that North Metro's concerns in this regard are "improbable in the extreme" and "statistically insignificant," but nonetheless speculating without support that "the types of mistakes [North Metro] identified could, if they are widespread, have a significant impact on the correct number of DBS subscribers in a franchise area"); Opposition at 7, n.23 ("The AFR speculates about a potential reporting error for a hypothetical 'new subdivision or annexation,' AFR at 11, but it presents no evidence of any such error.").

²⁸ *Order*, 28 FCC Rcd at 5516, Attach. A (reporting DBS penetration rates as follows: Blaine, 27.80%; Centerville, 31.01%; Circle Pines, 18.39%; Ham Lake, 32.81%; Lino Lakes, 31.40%, Spring Lake Park, 18.58%).

²⁹ See *id.* at 5513-14, paras. 16-17 (discussing the uncertainties associated with the Metropolitan Council data, including how the Council defines a household, and whether that definition is consistent with the detailed Census Bureau definition).

³⁰ See *id.*; see also *Marcus Cable Associates, LLC d/b/a Charter Communications, Petition for Determination of Effective Competition in Denton, TX (TX0580)*, Memorandum Opinion and Order, 25 FCC Rcd 4369, 4372, paras. 7 & 9 (2010) (rejecting an argument that the Commission should apply more current household numbers that were inconsistent with the Census Bureau's definition of "household"); *supra* n.21. Here, Comcast filed its petition in 2008, and the Bureau considered 2008 DBS subscriber numbers along with the most recent at the time of filing 2000 Census data.

³¹ AFR at 9-10.

withdrawn its request for a finding of effective competition in that community.³² Regarding the community of Circle Pines, we agree with the Bureau's determination in the *Order* that Comcast had produced sufficient evidence to refute North Metro's objections about the data.³³ Further, even if we accept as true North Metro's contention that there are 293 (and not 312) DBS subscribers within Circle Pines' corporate limits,³⁴ using the 2000 Census figure of 1,697 households for that community would still yield a DBS penetration rate of 17.26 percent, which is in excess of the 15 percent statutory threshold. We also disagree with North Metro that any imprecision in the data regarding these two communities automatically undermines the reliability of data from the other communities. Before the Bureau, North Metro provided little detail about the other five communities under consideration (*i.e.*, Blaine, Centerville, Ham Lake, Lino Lakes, and Spring Lake Park).³⁵ Likewise, in its AFR, North Metro fails to offer factual support for its claim that the data from the other communities is suspect.³⁶

11. *Discovery.* Second, North Metro argues that the Bureau "erred in not allowing [North Metro] to engage in any form of discovery . . . despite the fact that 47 [CFR] § 76.939 requires cable operators to respond to franchising authorities' requests for information."³⁷ We conclude that the Bureau did not err. We agree with the Bureau conclusion that North Metro's discovery request pertained to the five-digit zip code-based showings of DBS subscriber numbers that Comcast initially submitted, and thus was rendered moot by Comcast's later submission of more precise DBS subscriber numbers based on nine-digit zip code data.³⁸ The lack of the requested discovery thus was irrelevant to North Metro's "ability to evaluate the merits of Comcast's Petition."³⁹ Although North Metro, in its AFR, expressed concern that it had "no way of knowing exactly how zip+4 zip codes were allocated to a given Member City[.]"⁴⁰ North Metro did not revise its request for discovery from Comcast during the pendency of the proceeding in an attempt to obtain that information.

³² *Order*, 28 FCC Rcd at 5514-15, para. 20.

³³ *Id.* at 5512-13, para 14.

³⁴ *See* AFR at 4.

³⁵ *Order*, 28 FCC Rcd at 5514, para. 20.

³⁶ North Metro also expresses concern that Comcast's calculations regarding Blaine were imprecise, because in its Petition Comcast initially submitted DBS subscribership figures based on five-digit zip codes, then in its reply submitted lower DBS subscribership figures based on nine-digit zip codes, and later in a supplement submitted subscribership figures higher than the initial figures and also based on nine-digit zip codes. AFR at 11-12. We agree with the Bureau's conclusion that it was proper for Comcast initially to submit subscribership figures based on five-digit zip codes, and then in its reply to produce subscribership figures based on nine-digit zip codes, given that "North Metro had proposed that nine-digit data be used but chose not to produce it." *Order*, 28 FCC Rcd at 5509, para. 4. In addition, North Metro previously objected to the submission of Comcast's supplement, and the Bureau concluded that it would rely on the pre-supplement data rather than the supplement. *Id.* at 5509-10, para. 5. With regard to fluctuations in subscribership figures, we agree with the Bureau that while parties should submit evidence that is "as accurate as is reasonably practical," the statute "does not require that cable operators establish DBS subscribership with perfect precision." *Id.* at 5514-15, para. 20. In addition, when we use the 2000 Census household figure of 15,898, the 15 percent threshold for competing provider effective competition is met regardless of whether we use the DBS subscribership figure from Comcast's Petition (5,050, yielding a DBS penetration rate of 31.77 percent) or from its reply (4,420, yielding a DBS penetration rate of 27.80 percent). *See* Petition at Ex. 6; Comcast, Reply to Opposition, at Ex. D (Nov. 17, 2008). Further, as Comcast states in its Opposition, all DBS penetration rates calculated in its supplement ranged from 21.93 percent to 33.31 percent. *See* Opposition at 13, n.42. Accordingly, regardless of which DBS subscribership figures are used for Blaine, the test for competing provider effective competition is met.

³⁷ AFR at 8. *See also Order*, 28 FCC Rcd at 5509, para. 3.

³⁸ *Order*, 28 FCC Rcd at 5509, para. 3.

³⁹ AFR at 8-9.

⁴⁰ *Id.* at 11.

12. *Burden of Proof.* Third, North Metro argues that “the Bureau unlawfully shifted the burden of proof to [North Metro]” because it accepted “Comcast’s unverified information over [North Metro’s] documented, reproducible and fully explained data submissions.”⁴¹ We find that the burden that the Bureau applied was proper.⁴² The Bureau addressed North Metro’s argument and properly concluded that throughout the proceeding, the burden of proof properly remained on the cable operator, consistent with the versions of Sections 76.906 and 76.907(b) of the Commission’s rules that were in effect at that time.⁴³ The Bureau evaluated the record evidence provided by both parties and found that Comcast met its burden by producing data demonstrating that DBS subscribership was in excess of 15 percent. North Metro failed to rebut this showing with data that was at least as reliable as the Census data.⁴⁴ We cannot assess the reliability of the Metropolitan Council figures, given that it is unclear how the Metropolitan Council defines “household” or what methodology it uses to arrive at its numbers, whereas Census data is clearly accepted as reliable.⁴⁵ In any event, North Metro has not asserted that use of data from the Metropolitan Council would result in a failure to meet the test for competing provider effective competition. In fact, Comcast made calculations using Metropolitan Council data and concluded that the test is still met.⁴⁶

13. Upon review of the Application for Review and the entire record, we conclude that North Metro has failed to demonstrate the Bureau erred.⁴⁷ We therefore affirm the Bureau’s finding of effective competition.

⁴¹ AFR at 13.

⁴² See, e.g., *Marcus Cable Associates, LLC d/b/a Charter Communications*, Memorandum Opinion and Order, 25 FCC Rcd 4369 (2010) (upholding the Bureau’s order, which applied data based on the 2000 Census rather than alternate data advocated by the franchising authority).

⁴³ *Order*, 28 FCC Rcd at 5509, para. 4; 47 CFR §§ 76.906, 76.907(b) (2013).

⁴⁴ See *Order*, 28 FCC Rcd at 5513, para. 16; *supra* para. 9.

⁴⁵ North Metro asserts that the Bureau could have used a previously provided Metropolitan Council website to investigate how the Metropolitan Council defines a household. AFR at 16. We agree with Comcast that it is not “the Bureau’s responsibility to engage in such research, particularly when [North Metro] never informed the Bureau that this information appears on the website.” Opposition at 12 (footnote omitted). See also Opposition at 12, n. 40 (“If the information were available somewhere on this Metropolitan Council website, [North Metro] should have provided a narrative explanation, as well as a direct link or physical copy. Interestingly, while the AFR implies that the information is available somewhere at this general website, see AFR at 16, [North Metro] fails again to provide a direct link or physical copy.”).

⁴⁶ See Opposition at 12.

⁴⁷ We note that North Metro provides a policy argument for reinstating its previous certification to regulate cable prices, asserting that “eliminating the regulatory authority of the only governmental body capable of disciplining rates[] harms cable subscribers and is not in the public interest, because it is now a virtual certainty that subscriber rates will increase at an even faster pace.” Reply at 3 (footnote omitted). We cannot accept this argument, as these assertions are irrelevant to the statutory test for competing provider effective competition. See 47 U.S.C. § 543(1)(1)(B).

IV. ORDERING CLAUSE

14. Accordingly, **IT IS ORDERED** that the Application for Review filed by North Metro Telecommunications Commission in the above-captioned proceeding **IS DENIED**.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary